

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:)

MARK HERBST, M.D.)

MBC File # 03-2008-196409

Physician's & Surgeon's)
Certificate No. G 59419)


Respondent.)

**ORDER CORRECTING NUNC PRO TUNC
CLERICAL ERROR IN "PHYSICIAN'S & SURGEON'S CERTIFICATE NUMBER"
PORTION OF DECISION**

On its own motion, the Medical Board of California (hereafter "board") finds that there is a clerical error in the "Physician's & Surgeon's Certificate Number" portion of the Decision in the above-entitled matter and that such clerical error should be corrected so that the license number will conform to the Board's issued license.

IT IS HEREBY ORDERED that the license number contained on the Decision Order Page in the above-entitled matter be and hereby is amended and corrected nunc pro tunc as of the date of entry of the decision to read **G 59419**.

April 2, 2014



Barbara Yaroslavsky, Chair
Panel A

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:)	
)	
)	
)	
MARK HERBST, M.D.)	Case No. 03-2008-196409
)	
Physician's and Surgeon's)	
Certificate No. C 34406)	
)	
Respondent.)	
_____)	

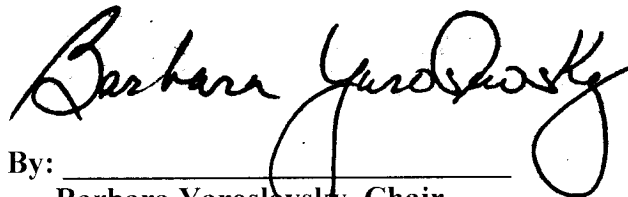
DECISION AND ORDER

The attached Stipulated Settlement and Disciplinary Order is hereby adopted by the Medical Board of California, Department of Consumer Affairs, State of California, as its Decision in this matter.

This Decision shall become effective at 5:00 p.m. on April 24, 2014.

IT IS SO ORDERED March 25, 2014.

MEDICAL BOARD OF CALIFORNIA


By: _____
Barbara Yaroslavy, Chair
Panel A

1 KAMALA D. HARRIS
Attorney General of California
2 JOSE R. GUERRERO
Supervising Deputy Attorney General
3 EMILY L. BRINKMAN
Deputy Attorney General
4 State Bar No. 219400
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7 *Attorneys for Complainant*

8 **BEFORE THE**
MEDICAL BOARD OF CALIFORNIA
9 **DEPARTMENT OF CONSUMER AFFAIRS**
10 **STATE OF CALIFORNIA**

11 In the Matter of the Accusation Against:
12 **MARK HERBST, M.D.**
13 **1891 Effie Street**
Los Angeles, CA 90026
14 **Physician's and Surgeon's Certificate No.**
G59419

Case No. 03-2008-196409

OAH No. 2013070928

STIPULATED SETTLEMENT AND
DISCIPLINARY ORDER

15
16 Respondent.

17 IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-
18 entitled proceedings that the following matters are true:

19 **PARTIES**

20 1. Kimberly Kirchmeyer ("Complainant") is the Executive Director of the Medical
21 Board of California. She brought this action solely in her official capacity and is represented in
22 this matter by Kamala D. Harris, Attorney General of the State of California, by Emily L.
23 Brinkman, Deputy Attorney General.

24 2. Respondent Mark Herbst, M.D. is represented in this proceeding by attorney Henry
25 Lewin, whose address is: Lewin & Levin, 11377 West Olympic Blvd., Fifth Floor, Los Angeles,
26 CA 90064-1683.

27 3. On or about January 12, 1987, the Medical Board of California issued Physician's and
28 Surgeon's Certificate No. G59419 to Mark Herbst, M.D. (Respondent). The Physician's and

1 Surgeon's Certificate was in full force and effect at all times relevant to the charges brought in
2 Accusation No. 03-2008-196409 and will expire on March 31, 2014, unless renewed.

3 JURISDICTION

4 4. Accusation No. 03-2008-196409 was filed before the Medical Board of California
5 (Board), Department of Consumer Affairs, and is currently pending against Respondent. The
6 Accusation and all other statutorily required documents were properly served on Respondent on
7 January 19, 2013. Respondent timely filed his Notice of Defense contesting the Accusation.

8 5. A copy of Accusation No. 03-2008-196409 is attached as exhibit A and incorporated
9 herein by reference.

10 ADVISEMENT AND WAIVERS

11 6. Respondent has carefully read, fully discussed with counsel, and understands the
12 charges and allegations in Accusation No. 03-2008-196409. Respondent has also carefully read,
13 fully discussed with counsel, and understands the effects of this Stipulated Settlement and
14 Disciplinary Order.

15 7. Respondent is fully aware of his legal rights in this matter, including the right to a
16 hearing on the charges and allegations in the Accusation; the right to be represented by counsel at
17 his own expense; the right to confront and cross-examine the witnesses against him; the right to
18 present evidence and to testify on his own behalf; the right to the issuance of subpoenas to compel
19 the attendance of witnesses and the production of documents; the right to reconsideration and
20 court review of an adverse decision; and all other rights accorded by the California
21 Administrative Procedure Act and other applicable laws.

22 8. Respondent voluntarily, knowingly, and intelligently waives and gives up each and
23 every right set forth above.

24 CULPABILITY

25 9. Respondent does not contest that, at an administrative hearing Complainant could
26 establish a prima facie case with respect to the charges and allegations contained in Accusation
27 No. 03-2008-196409 and that he has thereby subjected his license to disciplinary action.
28

10. Respondent agrees that his Physician's and Surgeon's Certificate is subject to discipline and he agrees to be bound by the Board's probationary terms as set forth in the Disciplinary Order below.

11. Respondent agrees that if he ever petitions for early termination or modification, or if the Board ever petitions for revocation of probation, all of the charges and allegations contained in Accusation No. 03-2008-196409 shall be deemed true, correct and fully admitted by Respondent for purposes of that proceeding or any other licensing proceeding involving respondent in the State of California.

CONTINGENCY

12. This stipulation shall be subject to approval by the Medical Board of California. Respondent understands and agrees that counsel for Complainant and the staff of the Medical Board of California may communicate directly with the Board regarding this stipulation and settlement, without notice to or participation by Respondent or his counsel. By signing the stipulation, Respondent understands and agrees that he may not withdraw his agreement or seek to rescind the stipulation prior to the time the Board considers and acts upon it. If the Board fails to adopt this stipulation as its Decision and Order, the Stipulated Settlement and Disciplinary Order shall be of no force or effect, except for this paragraph, it shall be inadmissible in any legal action between the parties, and the Board shall not be disqualified from further action by having considered this matter.

13. The parties understand and agree that Portable Document Format (PDF) and facsimile copies of this Stipulated Settlement and Disciplinary Order, including Portable Document Format (PDF) and facsimile signatures thereto, shall have the same force and effect as the originals.

14. In consideration of the foregoing admissions and stipulations, the parties agree that the Board may, without further notice or formal proceeding, issue and enter the following Disciplinary Order:

///

///

///

DISCIPLINARY ORDER

IT IS HEREBY ORDERED that Physician's and Surgeon's Certificate No. G59419 issued to Respondent Mark Herbst, M.D. (Respondent) is revoked. However, the revocation is stayed and Respondent is placed on probation for seven (7) years on the following terms and conditions.

1. PROFESSIONALISM PROGRAM (ETHICS COURSE). Within 60 calendar days of the effective date of this Decision, Respondent shall enroll in a professionalism program, that meets the requirements of Title 16, California Code of Regulations (CCR) section 1358. Respondent shall participate in and successfully complete that program. Respondent shall provide any information and documents that the program may deem pertinent. Respondent shall successfully complete the classroom component of the program not later than six (6) months after Respondent's initial enrollment, and the longitudinal component of the program not later than the time specified by the program, but no later than one (1) year after attending the classroom component. The professionalism program shall be at Respondent's expense and shall be in addition to the Continuing Medical Education (CME) requirements for renewal of licensure.

A professionalism program taken after the acts that gave rise to the charges in the Accusation, but prior to the effective date of the Decision may, in the sole discretion of the Board or its designee, be accepted towards the fulfillment of this condition if the program would have been approved by the Board or its designee had the program been taken after the effective date of this Decision.

Respondent shall submit a certification of successful completion to the Board or its designee not later than 15 calendar days after successfully completing the program or not later than 15 calendar days after the effective date of the Decision, whichever is later.

2. NOTIFICATION. Within seven (7) days of the effective date of this Decision, the Respondent shall provide a true copy of this Decision and Accusation to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to Respondent, at any other facility where Respondent engages in the practice of medicine, including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to

Respondent. Respondent shall submit proof of compliance to the Board or its designee within 15 calendar days.

This condition shall apply to any change(s) in hospitals, other facilities or insurance carrier.

3. SUPERVISION OF PHYSICIAN ASSISTANTS. During probation, Respondent is prohibited from supervising physician assistants.

4. OBEY ALL LAWS. Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments, and other orders.

5. QUARTERLY DECLARATIONS. Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

Respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

6. GENERAL PROBATION REQUIREMENTS.

Compliance with Probation Unit

Respondent shall comply with the Board's probation unit and all terms and conditions of this Decision.

Address Changes

Respondent shall, at all times, keep the Board informed of Respondent's business and residence addresses, email address (if available), and telephone number. Changes of such addresses shall be immediately communicated in writing to the Board or its designee. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021(b).

Place of Practice

Respondent shall not engage in the practice of medicine in Respondent's or patient's place of residence, unless the patient resides in a skilled nursing facility or other similar licensed facility.

License Renewal

Respondent shall maintain a current and renewed California physician's and surgeon's license.

Travel or Residence Outside California

Respondent shall immediately inform the Board or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) calendar days.

In the event Respondent should leave the State of California to reside or to practice Respondent shall notify the Board or its designee in writing 30 calendar days prior to the dates of departure and return.

7. INTERVIEW WITH THE BOARD OR ITS DESIGNEE. Respondent shall be available in person upon request for interviews either at Respondent's place of business or at the probation unit office, with or without prior notice throughout the term of probation.

8. NON-PRACTICE WHILE ON PROBATION. Respondent shall notify the Board or its designee in writing within 15 calendar days of any periods of non-practice lasting more than 30 calendar days and within 15 calendar days of Respondent's return to practice. Non-practice is defined as any period of time Respondent is not practicing medicine in California as defined in Business and Professions Code sections 2051 and 2052 for at least 40 hours in a calendar month in direct patient care, clinical activity or teaching, or other activity as approved by the Board. All time spent in an intensive training program which has been approved by the Board or its designee shall not be considered non-practice. Practicing medicine in another state of the United States or Federal jurisdiction while on probation with the medical licensing authority of that state or jurisdiction shall not be considered non-practice. A Board-ordered suspension of practice shall not be considered as a period of non-practice.

In the event Respondent's period of non-practice while on probation exceeds 18 calendar months, Respondent shall successfully complete a clinical training program that meets the criteria of Condition 18 of the current version of the Board's "Manual of Model Disciplinary Orders and Disciplinary Guidelines" prior to resuming the practice of medicine.

Respondent's period of non-practice while on probation shall not exceed two (2) years.

1 Periods of non-practice will not apply to the reduction of the probationary term.

2 Periods of non-practice will relieve Respondent of the responsibility to comply with the
3 probationary terms and conditions with the exception of this condition and the following terms
4 and conditions of probation: Obey All Laws; and General Probation Requirements.

5 9. COMPLETION OF PROBATION. Respondent shall comply with all financial
6 obligations (e.g., restitution, probation costs) not later than 120 calendar days prior to the
7 completion of probation. Upon successful completion of probation, Respondent's certificate shall
8 be fully restored.

9 10. VIOLATION OF PROBATION. Failure to fully comply with any term or condition
10 of probation is a violation of probation. If Respondent violates probation in any respect, the
11 Board, after giving Respondent notice and the opportunity to be heard, may revoke probation and
12 carry out the disciplinary order that was stayed. If an Accusation, or Petition to Revoke Probation,
13 or an Interim Suspension Order is filed against Respondent during probation, the Board shall have
14 continuing jurisdiction until the matter is final, and the period of probation shall be extended until
15 the matter is final.

16 11. LICENSE SURRENDER. Following the effective date of this Decision, if
17 Respondent ceases practicing due to retirement or health reasons or is otherwise unable to satisfy
18 the terms and conditions of probation, Respondent may request to surrender his or her license.
19 The Board reserves the right to evaluate Respondent's request and to exercise its discretion in
20 determining whether or not to grant the request, or to take any other action deemed appropriate
21 and reasonable under the circumstances. Upon formal acceptance of the surrender, Respondent
22 shall within 15 calendar days deliver Respondent's wallet and wall certificate to the Board or its
23 designee and Respondent shall no longer practice medicine. Respondent will no longer be subject
24 to the terms and conditions of probation. If Respondent re-applies for a medical license, the
25 application shall be treated as a petition for reinstatement of a revoked certificate.

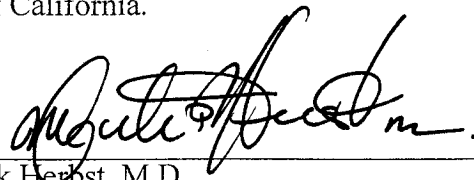
26 12. PROBATION MONITORING COSTS. Respondent shall pay the costs associated
27 with probation monitoring each and every year of probation, as designated by the Board, which
28 may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of

1 California and delivered to the Board or its designee no later than January 31 of each calendar
2 year.

3 ACCEPTANCE

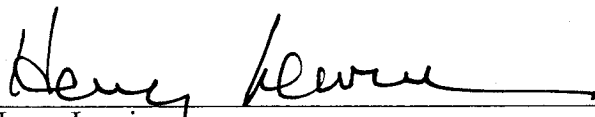
4 I have carefully read the above Stipulated Settlement and Disciplinary Order and have fully
5 discussed it with my attorney, Henry Lewin. I understand the stipulation and the effect it will
6 have on my Physician's and Surgeon's Certificate. I enter into this Stipulated Settlement and
7 Disciplinary Order voluntarily, knowingly, and intelligently, and agree to be bound by the
8 Decision and Order of the Medical Board of California.

9
10 DATED: 2/21/14


11 Mark Herbst, M.D.
Respondent

12 I have read and fully discussed with Respondent Mark Herbst, M.D. the terms and
13 conditions and other matters contained in the above Stipulated Settlement and Disciplinary Order.
14 I approve its form and content.

15 DATED: 2/21/14


16 Henry Lewin
Attorney for Respondent

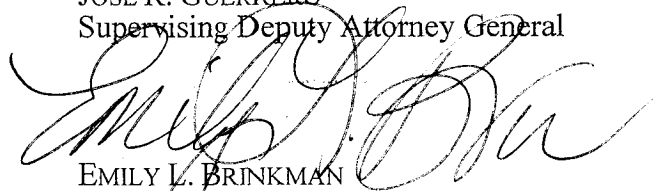
17 ENDORSEMENT

18 The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully
19 submitted for consideration by the Medical Board of California.

20 Dated: 2/21/2014

21 Respectfully submitted,

22 KAMALA D. HARRIS
Attorney General of California
23 JOSE R. GUERRERO
Supervising Deputy Attorney General


24
25 EMILY L. BRINKMAN
26 Deputy Attorney General
Attorneys for Complainant

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28 40826018.doc

Exhibit A

Accusation No. 03-2008-196409

1 KAMALA D. HARRIS
Attorney General of California
2 JOSE R. GUERRERO
Supervising Deputy Attorney General
3 EMILY L. BRINKMAN
Deputy Attorney General
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7 *Attorneys for Complainant*

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO *January 9, 2013*
BY: *J. Telchak* ANALYST

8 BEFORE THE
MEDICAL BOARD OF CALIFORNIA
9 DEPARTMENT OF CONSUMER AFFAIRS
10 STATE OF CALIFORNIA

11 In the Matter of the Accusation Against:

Case No. 03-2008-196409

12 **MARK HERBST, M.D.**

A C C U S A T I O N

13 1891 Effie Street
Los Angeles, CA 90026
14 Physician's and Surgeon's Certificate No.
G59419

15 Respondent.
16

17
18 Complainant alleges:

19 **PARTIES**

20 1. Linda K. Whitney (Complainant) brings this Accusation solely in her official capacity
21 as the Executive Director of the Medical Board of California, Department of Consumer Affairs.

22 2. On or about January 12, 1987, the Medical Board of California issued Physician's and
23 Surgeon's Certificate Number G59419 to Mark Herbst, M.D. (Respondent). The license is
24 current and renewed and expires March 31, 2014.

25 ///

26 ///

27 ///

28 ///

JURISDICTION

3. This Accusation is brought before the Medical Board of California¹ (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 2227 of the Code provides that a licensee who is found guilty under the Medical Practice Act may have his or her license revoked, suspended for a period not to exceed one year, placed on probation and required to pay the costs of probation monitoring, or such other action taken in relation to discipline as the Division deems proper.

5. Section 2234 of the Code, states in relevant part:

"The board shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

"(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter.

"(e) The commission of any act involving dishonesty or corruption which is substantially related to the qualifications, functions, or duties of a physician and surgeon.

"(f) Any action or conduct which would have warranted the denial of a certificate."

6. Section 2236 of the Code states:

"(a) The conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct within the meaning of this chapter [Chapter 5, the Medical Practice Act]. The record of conviction shall be conclusive evidence only of the fact that the conviction occurred.

"(b) The district attorney, city attorney, or other prosecuting agency shall notify the Division of Medical Quality of the pendency of an action against a licensee charging a felony or misdemeanor immediately upon obtaining information that the defendant is a licensee. The notice shall identify the licensee and describe the crimes charged and the facts alleged. The

¹ The term "Board" means the Medical Board of California. "Division of Medical Quality" shall also be deemed to refer to the Board.

1 prosecuting agency shall also notify the clerk of the court in which the action is pending that the
2 defendant is a licensee, and the clerk shall record prominently in the file that the defendant holds
3 a license as a physician and surgeon.

4 “(c) The clerk of the court in which a licensee is convicted of a crime shall, within 48 hours
5 after the conviction, transmit a certified copy of the record of conviction to the board. The
6 division may inquire into the circumstances surrounding the commission of a crime in order to fix
7 the degree of discipline or to determine if the conviction is of an offense substantially related to
8 the qualifications, functions, or duties of a physician and surgeon.

9 “(d) A plea or verdict of guilty or a conviction after a plea of nolo contendere is deemed to
10 be a conviction within the meaning of this section and Section 2236.1. The record of conviction
11 shall be conclusive evidence of the fact that the conviction occurred.”

12 **CAUSE FOR DISCIPLINE**

13 (Unprofessional Conduct/Criminal Conviction)

14 7. Respondent is subject to disciplinary action under section 2234 and 2236 in that
15 Respondent was convicted of a misdemeanor violation of Government Code section 6201,
16 noncustodial officer: theft, destruction, alteration, falsification. The circumstances are as follows:

17 8. The California Department of Corrections and Rehabilitation contracted with Bay
18 Area Doctors, Incorporated (BADI) to provide doctor services to California prisons for \$250 per
19 hour while the doctors were on prison grounds and \$50 per hour while off grounds but on call.

20 9. Respondent was contracted with BADI to provide medical services to inmates at
21 Salinas Valley State Prison (Salinas Valley) at the rate of \$215 per hour while on grounds and
22 \$35 per hour while on call but off grounds.

23 10. On or about February 2007, Respondent began working at Salinas Valley as a
24 contract psychiatrist.

25 11. Respondent completed Contractor Weekly Worksheets (CWW) that encompassed the
26 hours he worked at Salinas Valley. On these sheets, Respondent claimed he worked from 0800 to
27 1800 for 38 days that he worked at Salinas Valley for a total of 380 hours. Respondent also
28 claimed that he worked “on call” overnight between the hours of 1800 to 0800 for eight shifts for

a total of 108 hours². BADI billed the state of California \$87,500 for these services. Respondent also completed Contractor Daily Worksheets (CDW) that listed the date, time, location, names, and CDCR numbers for all the patients he treated.

12. Respondent completed CWW's and CDW's for the following dates and hours:

Date	Time	Total Hours	No. Patients Seen	Hours Billed by BADI
2/27/2007	0800-1800	10	* ³	*
2/28/2007	0800-1800	10	*	*
3/1/2007	0800-1800	10	11	10
3/2/2007	0800-1800	10	14	10
3/6/2007	0800-1800	10	10	10
3/7/2007	0800-1800	10	8 ⁴	10
	1800-0800 (on call)	14	0	14
3/8/2007	0800-1800	10	10	10
	1800-0800 (on call)	14	0	14
3/9/2007	0800-1800	10	4	10
3/12/2007	0800-1800	10	7	10
3/16/2007	0800-1800	10	7	10
3/20/2007	0800-1800	10	*	10
3/21/2007	0800-1800	10	*	10
3/22/2007	0800-1800	10	*	10
3/23/2007	0800-1800	10	*	10
3/26/2007	0800-1800	10	*	10

² For two overnight shifts, Respondent only billed 12 hours rather than 14 hours.

³ "*" no Contractors Daily Worksheets with patient information was provided

⁴ Respondent completed the Daily Worksheet listing the names and CDCR numbers for 8 patients. The form also required him to total the number of patients he saw and Respondent totaled it to 12 despite only listing 8 patient names.

1	3/30/2007	0800-1800	10	*	10
2	4/2/2007	0800-1800	10	13	10
3		1800-0800 (on call) ⁵	14	0	14
4	4/6/2007	0800-1800	10	11 ⁶	10
5	4/9/2007	0800-1800	10	11	10
6		1800-0800 (on call)	14	0	14
7	4/13/2007	0800-1800	10	12	10
8	4/16/2007	0800-1800	10	14	10
9		1800-0800 (on call)	14	0	14
10	4/18/2007	0800-1800 ⁷	10	0	10
11	4/19/2007	0800-1800	10	*	0
12	4/20/2007	0800-1800	10	10	10
13	4/30/2007	0800-1800	10	11	10
14		1800-0800 (on call)	12 ⁸	0	12
15	5/4/2007	0800-1800	10	11	10
16	5/7/2007	"Day" ⁹	10	12	10
17		"PM phone coverage"	12	0	12
18	5/11/2007	"Day"	10	10	10
19	5/14/2007	"Day"	10	16	10
20	5/18/2007	"Day"	10	11	10
21	5/21/2007	0800-1800	10	14	10
22	5/25/2007	0800-1800	10	9	10
23	6/3/2007	"Day 0800-1800"	10	16 ¹⁰	10

⁵ Respondent lists the date for this on call as 4/4/2007, but BADI billed the state for an on-call shift on 4/2/07 to 4/3/07.

⁶ Respondent listed the names of 11 patients, crossed out the 12th patient's name, but indicated he still treated 12 patients on the CDW.

⁷ Respondent listed his hours for this day as "RETREAT 0800-1800."

⁸ Only billed for 12 hours despite it being a 14 hour shift.

⁹ Respondent listed the hours worked as "Day" or "PM phone coverage."

6/7/2007	"Day 0800-1800"	10	13	10
6/11/2007	"Day"	10	18	10
6/15/2007	"Day"	10	10	10
6/18/2007	"Day"	10	13	10
6/22/2007	"Day"	10	17	10
6/11/2007	"On Call"	14	0	14

13. On October 9, 2007, Respondent was interviewed by investigators with the Office of the Inspector General (OIG) regarding the possible fraudulent billing practices at Salinas Valley. At first, he indicated that he might be aware that people "padded their time" but that he did not do that. He did admit that he never really had ten hours of work to do during the day and would spend much of his time reading in the cafeteria in the administration building. Respondent indicated that the Chief Medical Officer was aware of his schedule and told him that was an acceptable use of his time as long as he did not have any patients to see. Respondent also indicated that he was aware people would leave the grounds early yet still bill the state for that time but that he would never do that. Respondent further admitted that during this time he was living in Hawaii so he would fly in on Monday morning, then rent a car, and drive to Salinas Valley. Then he would leave on Friday afternoon to catch a flight back to Hawaii. Respondent told the OIG investigators that he would make up anytime that he was late or left early.

14. During OIG's investigation of Respondent, they located his rental car records from San Francisco airport.¹¹ The records indicate that Respondent would pick up his rental car in San Francisco at approximately 7:30 a.m. and would return the rental between 5:30 to 6:30 p.m. Often these were days that Respondent recorded being at work at 8:00 am through 6:00 p.m. It is approximately 117 miles between San Francisco and Salinas Valley.

¹⁰ Respondent listed the names of 16 patients, but indicated he treated 17 patients on the CDW.

¹¹ On one occasion, Respondent flew from Hawaii to Oakland International Airport. OIG investigators located similar rental car information for April 2, 2007, when Respondent picked up his car at 7:18 a.m., drove 114 miles to Salinas Valley, and began working at 8:00 am. Then on April 6, 2007, Respondent claimed he worked until 6:00 p.m., drove 114 miles to the Oakland Airport, yet still returned his rental car at 4:22 p.m.

1 15. For example, on March 12, 2007, Respondent picked up his rental car at 7:28 a.m.
2 and recorded that he started work at 8:00 a.m. meaning he traveled 117 miles in 32 minutes. He
3 then returned the rental car on March 16, 2007 at 5:32 p.m., yet recorded that he worked until
4 6:00 p.m. that evening.

5 16. OIG investigators located similar rental car records for the following dates: March 12,
6 2007; March 16, 2007; March 20, 2007; March 23, 2007; March 26, 2007; March 30, 2007; April
7 2, 2007; April 6, 2007; April 30, 2007; May 4, 2007; June 4, 2007; June 8, 2007; June 11, 2007;
8 June 15, 2007; June 18, 2007; and June 22, 2007.

9 17. The OIG investigators also reviewed security videos from Salinas Valley from the
10 control booth where workers are required to sign in and out before entering and exiting the
11 secured area. They reviewed videos for 31 of the 35 days that Respondent submitted CDW's for,
12 showing that he spent 130.15 hours in the secured perimeter, not the hours as he claimed on the
13 CWW's.

14 18. OIG investigators also reviewed Respondent's cell phone records and determined
15 there were at least ten dates that had incoming and outgoing calls placed using cell towers outside
16 of Soledad, California (the location of Salinas Valley) during time that Respondent claimed to be
17 on grounds working. For example, on Monday April 30, 2007, Respondent claimed to be
18 working all day and then on call, but at 3:19 p.m., an outgoing cell phone call from his phone was
19 made using a cell tower in San Miguel, California, which is 68 miles from Salinas Valley.
20 Another example occurred on Friday May 18, 2007, when Respondent claimed he worked a ten
21 hour day at Salinas Valley, but at 5:46 p.m. an incoming call to his cell phone bounced off of a
22 tower in San Francisco, 114 miles north of Salinas Valley.

23 19. OIG investigators recovered similar cell phone records for the following dates: April
24 30, 2007; May 7, 2007; May 11, 2007; May 14, 2007; May 18, 2007; May 21, 2007; May 25,
25 2007; June 4, 2007; June 8, 2007; and June 11, 2007.

26 20. On or about January 21, 2010, Respondent was charged with the following felony
27 criminal charges in the Superior Court of California, County of Monterey:
28

1 Count 7:¹² Penal Code § 72, fraudulent claims on March 1, 2007;

2 Count 8: Penal Code § 72, fraudulent claims between April 1, 2007 through April 30,
3 2007;

4 Count 9: Penal Code, §72, fraudulent claims between May 1, 2007 through May 30,
5 2007;

6 Count 10: Penal Code § 72, fraudulent claims between June 1, 2007 through June 30,
7 2007;

8 Count 11: Penal Code § 487(a), Grand Theft by False Pretenses between March 1,
9 2007 through June 30, 2007.

10 21. Following a preliminary hearing on the criminal complaint, the Superior Court Judge
11 found that there was sufficient evidence to hold Respondent to answer as to the charges in the
12 complaint. On or about January 24, 2011, the District Attorney filed an Information for the
13 following felony charges in response to the Court's order after the preliminary hearing:

14 Count 1: Penal Code § 72, presenting fraudulent claims on March 1, 2007;

15 Count 2: Penal Code § 424, embezzlement by a public officer between March 1, 2007
16 through March 31, 2007;

17 Special Allegation: Penal Code § 803(b), prosecution pending in State of California,
18 County of Monterey;

19 Count 3: Penal Code § 72, presenting fraudulent claims between April 1, 2007
20 through April 30, 2007;

21 Count 4: Penal Code § 424, embezzlement by a public officer between April 1, 2007
22 through April 30, 2007;

23 Special Allegation: Penal Code § 803(b), prosecution pending in State of California,
24 County of Monterey;

25 Count 5: Penal Code, §72, presenting fraudulent claims between May 1, 2007 through
26 May 30, 2007;

27 ¹² Respondent was charged in the same complaint with a co-worker Wade F. Exum, who
28 was charged in the first six counts of the complaint.

1 Count 6: Penal Code § 424, embezzlement by a public officer between May 1, 2007
2 through May 31, 2007;

3 Special Allegation: Penal Code § 803(b), prosecution pending in State of California,
4 County of Monterey;

5 Count 8¹³: Penal Code § 72, presenting fraudulent claims between April 1, 2007
6 through April 30, 2007;

7 Count 9: Penal Code § 72, presenting fraudulent claims between May 1, 2007 through
8 May 30, 2007;

9 Count 9:¹⁴ Penal Code § 487(a), grand theft by false pretenses between March 1, 2007
10 through June 30, 2007;

11 Count 10: Government Code § 6201, destroying/altering/etc. of a public record on
12 March 9, 2007;

13 Special Allegation: Penal Code § 803(b), prosecution pending in State of California,
14 County of Monterey.

15 22. On or about April 3, 2012, the District Attorney filed a First Amended Information
16 listing the following felony charges against Respondent:

17 Count 1: Penal Code § 72, presenting fraudulent claims on March 1, 2007;

18 Count 2: Penal Code § 424, embezzlement by a public officer between March 1, 2007
19 through March 31, 2007;

20 Special Allegation: Penal Code § 803(b), prosecution pending in State of California,
21 County of Monterey;

22 Count 3: Penal Code § 72, presenting fraudulent claims between April 1, 2007
23 through April 30, 2007;

24 Count 4: Penal Code § 424, embezzlement by a public officer between April 1, 2007
25 through April 30, 2007;

27 ¹³ The Information excludes count 7.

28 ¹⁴ This Information was mis-numbered to include a second count 9.

1 Special Allegation: Penal Code § 803(b), prosecution pending in State of California,
2 County of Monterey;

3 Count 5: Penal Code, §72, presenting fraudulent claims between May 1, 2007 through
4 May 30, 2007;

5 Count 6: Penal Code § 424, embezzlement by a public officer between May 1, 2007
6 through May 31, 2007;

7 Special Allegation: Penal Code § 803(b), prosecution pending in State of California,
8 County of Monterey;

9 Count 7: Penal Code §72, presenting fraudulent claims between April 1, 2007 through
10 April 30, 2007;

11 Count 8: Penal Code § 424, embezzlement by a public officer between June 1, 2007
12 through June 30, 2007;

13 Count 9: Penal Code § 487(a), grand theft by false pretenses between March 1, 2007
14 through June 30, 2007;

15 Count 10: Government Code § 6201, destroying/altering/etc. of a public record on
16 March 9, 2007;

17 Special Allegation: Penal Code § 803(b), prosecution pending in State of California,
18 County of Monterey.

19 23. On or about April 19, 2012, Respondent pled no contest to Government Code § 6201,
20 destroying or altering public records (count 10), as a misdemeanor, reduced from a felony. As
21 part of the plea agreement, the remaining charges were dismissed. The Court sentenced
22 Respondent to two years probation and ordered him to complete 300 hours of community service,
23 pay restitution to the state in the amount of \$44,963.00, and various other fines and fees. The
24 Court approved Respondent's request to perform community service at Gateway Hospital.

25 24. On or about August 2, 2012, the Court entered an order under Penal Code § 1203.4,
26 dismissing the case because Respondent completed all the terms of his probation.

27 25. Respondent was interviewed by telephone on November 30, 2012 with an
28 investigator for the Medical Board. During that interview, Respondent indicated that he

1 previously completed the Boards diversion program in 2006, but otherwise has no record of
2 discipline with the Board.

3 26. Respondent also indicated that when he first started working at Salinas Valley he was
4 told by the Chief Medical Officer that once he finished his work he could leave prison grounds as
5 long as he remained available by phone and that he could bill for the entire time he was scheduled
6 for. He further stated that the hours he billed for were the hours that he was available for work.

7 27. Respondent currently continues to work at Gateway Hospital where he performed his
8 community service hours. He is a paid medical provider for Gateway Hospital. He also teaches
9 at UCLA Keck School of Medicine on a part time basis.

10 **PRAYER**

11 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
12 and that following the hearing, the Medical Board of California issue a decision:

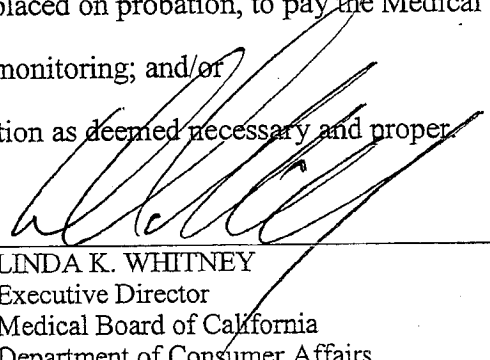
13 1. Revoking or suspending Physician's and Surgeon's Certificate Number G59419,
14 issued to Mark Herbst, M.D.

15 2. Revoking, suspending or denying approval of Mark Herbst's, M.D. authority to
16 supervise physician assistants, pursuant to section 3527 of the Code;

17 3. Ordering Mark Herbst, M.D., if placed on probation, to pay the Medical Board of
18 California the reasonable costs of probation monitoring; and/or

19 4. Taking such other and further action as deemed necessary and proper.

20 DATED: January 9, 2013
21 _____


22 LINDA K. WHITNEY
23 Executive Director
24 Medical Board of California
25 Department of Consumer Affairs
26 State of California
27 Complainant
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